No. 251

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

vs.

SEAMPRUFE, INC. (HOLDENVILLE PLANT), *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

Seamprufe, Inc., Respondent herein, prays that the petition of the Solicitor General, on behalf of the National Labor Relations Board, for the issuance of a Writ of Certiorari to review the decision of the United States Court of Appeals for the Tenth Circuit entered on May 4, 1955, denying enforcement of an order issued by the Board against Seamprufe, Inc. (Holdenville Plant) be denied.

Opinions Below

The opinion of the court below is reported at National Labor Relations Board v. Seamprufe, Inc. (Holdenville Plant) C.A. 10, 222 F 2d 858 (adv.). The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 10-25, 35-38) are reported at 109 N.L.R.B. 24.

Jurisdiction

The judgment of the court below was entered on May 4, 1955 (App. A, *infra* p. 19). The jurisdiction of this court is invoked under 28 U.S.C. 1254, and Section 10 (e) of the National Labor Relations Act, as amended.

Question Presented

Whether an employer violates Section 8 (a) (1) of the National Labor Relations Act by prohibiting nonemployee union organizers from distributing union literature and soliciting union memberships on his parking lot where it is not impossible or unreasonably difficult for the union to distribute organizational literature to the employees entirely off the employer's premises.

Statute Involved

The pertinent provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C., 151 et. seq.), are set forth in Appendix B, infra, p. 20.

Statement

In connection with the policing of its property, Respondent adopted and enforced a *No-trespassing rule.* (R. 83-84) Signs to that effect were placed on the property. (R. 62-64, 71-72) The rule was enforced on a non-discriminatory basis, and there is no finding or contention to the contrary. Likewise Respondent's motivation in adopting and enforcing such rule is not questioned.

It is of prime importance to note at the outset that *Respondent did not have a "no-distribution" or a "no-solicitation" rule.* This fact is not questioned. There is no evidence that Respondent prohibited or attempted to prohibit its *employees*, or any of them, from distributing union literature or from soliciting union memberships or from engaging in any other activities in behalf of the union or in respect to self-organization on its property.

In the non-discriminatory enforcement of its no-trespassing rule Respondent did not permit strangers to come upon its property without its permission. It withheld such permission from various persons on various missions including *non-employee* union organizers employed by the complaining union who sought to station themselves on Respondent's property between the parking area and the factory doors for the purpose, on some occasions, of distributing union literature and on other occasions of simply saying "Good morning" to the employees. Such organizers and other strangers were ordered by Respondent to leave and not enter upon its property.

Undisputed is the fact that the complaining union by which such organizers were employed does not represent any of the employees at the Holdenville plant for purposes of collective bargaining. (R. 11) It is likewise undisputed that the persons in respect to whom the no-trespassing rule was enforced were not employees of Respondent. (R. 11)

It was stipulated that on the occasions involved Respondent employed approximately 200 employees,

two-thirds of whom resided in Holdenville, and a majority of the remaining one-third resided in communities within five or ten miles of Holdenville, while a few lived as much as thirty miles from that city. (R. 75) The plant operated only one shift. (R. 12, 71)

Two union organizers testified that about 4:30 one afternoon when the shift ended they observed the employees leaving the plant property in automobiles and that as they entered the public road most of them were "bumper to bumper" and proceeding slowly. They testified that none of the cars stopped upon reaching and entering the public road. Traffic on the public roads adjoining the plant is light. (R. 13-14, 18, 42-43, 50, 64-66)

It is upon this testimony that the Trial Examiner and the Board rested their finding "that this non-stop method of driving to and from the plant area is the normal manner in which the employees *invariably arrive at the plant area in the morning and depart in the evening.*" (Emphasis added, R. 14, 35-36)

This finding, particularly in respect to the manner in which the employees arrive at the plant in the morning, is a naked inference that is unsupported by and contrary to the record. There is nothing in the record to show or from which it may be inferred reasonably that the employees arrived in "caravan fashion." To the contrary is undisputed evidence that the arrival of employees is over a considerable period of time. (R. 56-57)

These are the "special circumstances" from which

the Examiner and the Board concluded ". . . that the difficulty of reaching prospective union members and distributing union literature to employees off of Respondent's property is virtually impossible . . ." (R. 14, 18, 35)

The record is barren of anything to show that the union ever attempted to distribute its literature or to reach prospective members at the entrances to or exits from or elsewhere off Respondent's property. Likewise there is nothing to show that the employees had any occasion or reason to stop when leaving Respondent's property on the single occasion about which the union organizers testified and upon which the Board's order rests.

The Board attempted to meet this fatal deficiency in proof with the simple statement, based solely on surmise and conjecture, that it did not "believe that it was necessary for the organizers to go through the motions of making such an attempt as it is apparent that the nonstop method of driving by the employees would have rendered the effort futile and abortive." (R. 36, footnote 2)

On this flimsy and patently insubstantial record the Board adopted the Report of the Examiner and ordered Respondent

> (1) To rescind and cease and desist from enforcing "its rule prohibiting the distribution of union literature and solicitation of union memberships upon and adjacent to its parking lot during the employees nonworking time," provided, however, "that the Respondent may impose reasonable and non-discriminatory regula-

tions in the interest of plant efficiency and discipline, but not as to deny access to union representatives for the purpose of effecting such distribution or solicitation,"

(2) To cease and desist from "Engaging in any like or related acts or conduct which interferes with, restrains, or coerces its employees in the exercise of their right to self-organization . . ." under the Act, and

(3) To post notices stating, in substance and among other things, that union representatives will be given "full access" to the Respondent's property "on and near" its parking lot during nonworking hours of employees. (R. 35-38)

It was this sweeping order which the Court of Appeals refused to enforce. (222 F. 2d 858 (adv.)

Argument

The judgment of the Court of Appeals is correct and is not in conflict with any other decision so as to warrant further review of the case by this court.

Petitioner asserts that the decision of the Court of Appeals conflicts with other Courts of Appeals decisions, specifically: *National Labor Relations Board v. Ranco, Inc.* (C.A. 6) 222 F. 2d 543, (adv.), enforcing 109 N.L.R.B. 998; *National Labor Relations Board v. Caldwell Furniture Company* (C.A. 4) 199 F. 2d 267, certiorari denied, 345 U.S. 907, enforcing 97 N.L.R.B. 1501; *National Labor Relations Board v. Carolina Mills, Inc.*, (C.A. 4) 190 F. 2d 675, enforcing 92 N.L.R.B. 1141.

That no conflict exists will be demonstrated by the following analysis of the cited cases.

Ranco, Inc., 109 N.L.R.B. 998 was decided by the Board August 25, 1954. The following comments of Chairman Farmer and Member Peterson are significant:

> "The single issue in this case is strictly limited to the extent of an employer's right to deny to non employee union representatives the privilege of distributing union campaign literature on the company's parking lot. As we view it, the rule in such situations is that an employer may not enforce such a rule if in fact it is impossible or unreasonably difficult for the union to distribute organizational literature to the employees entirely off the employer's premises.
>
> "We agree with the majority on the record before us that the General Counsel has, by affirmative evidence, proved such inaccessibility at this plant.
>
> "We do not, however, adopt the breadth of the rationale set out by the Trial Examiner in his Intermediate Report, wherein he apparently confuses the question of an employer's right to exclude nonemployees from the parking lot and the employer's right to prohibit union solicitation and activity by its employees on company property during nonworking hours. There is an implication in the Intermediate Report, that whenever an employer would exclude nonemployees from the parking lot, 'the burden is upon the employer to show the existence of circumstances warranting the prohibition.' That is not the law as we understand it. An employer must justify, by carrying an affirmative burden

resting upon him, a blanket prohibition against union activities or solicitation by his employees on company property. However, when it comes to the exclusion of strangers from the plant premises, the exercise of such privilege does not depend upon an employer being able to affirmatively prove that the rule is justified. Rather, as stated above, the affirmative burden rests upon the General Counsel to prove inaccessibility off the premises, and failing this the outside organizers have no right, enforceable by this Board, to come on the employer's premises for organizing purposes. We concur in the majority decision because we are satisfied that the General Counsel has sustained his Burden of Proof."

The *Ranco* case was enforced by the Court of Appeals for the Sixth Circuit in a per curiam decision, which stated in substance that there was substantial evidence to support findings of fact of the Board. It is thus apparent in the *Ranco* case that the Board found and the Court of Appeals agreed that on the evidence in the case it was impossible or unreasonably difficult for the union to distribute organizational literature to the employees entirely off the employer's premises.

This is in sharp contrast to the case at bar. Here, the Court of Appeals for the Tenth Circuit said,

"The Board found special circumstances of inaccessibility. *But we do not think that conclusion is legally justified by the facts.* True, the union organizers could not contact the employees at the entrance or exit to the company property, *but these circumstances did not insulate the employees from the union organizers.* **** *The em-*

ployees here lived in or near a small city and were easily accessible to union solicitors. There was no impediment to union solicitation off company property amounting to a deprivation of the right of self-organization." (App. A p. 18) (Emphasis supplied.)

N.L.R.B v. Caldwell Furniture Co., 199 F. 2d 267 (C.A. 4) was decided per curiam on the authority of the *Le Tourneau* case. The Board's decision, 97 NLRB 1501, shows that the rule there involved was general and applied to *employees*. The rule was adopted to prevent the distribution of *all* literature and prohibited the distribution of *any* literature. Gatemen were instructed to see that *no one* was passing out leaflets or placing them in or on the cars on the parking lot. (pp. 1507-1509)

N.L.R.B. v. Carolina Mills, 190 F. 2d 675 (C.A. 4) was decided per curiam. The Board's decision is reported at 92 NLRB 1141. The Trial Examiner found, with Board approval, that the Respondent there had prohibited "the Union, its representatives and members, and *other employees* from distributing the union literature on Respondent's property." (pp. 1168-1169, emphasis added) Apparently there was some evidence to show that in the particular situation there involved distribution off Respondent's property was not effective. This again is in sharp contrast to the case at bar.

In both the *Caldwell Furniture Co.* case and the *Carolina Mills* case the prohibitions invoked by the companies embraced employees. In the case at bar no restraint was placed upon employees during their

non-working hours with respect to union membership proliferation. The rule complained of applied to trespassers only.

It is clear that the difference between the Board and the court below was a factual disagreement over the relative facility of communication between employees and union representatives on employer's premises and elsewhere.

The decision of the court below is not in conflict with the decision of this court in *National Labor Relations Board v. Le Tourneau Company*, 324 U.S. 793. The *Le Tourneau* case involved rules of the company which applied to *employees* only. The rights of employees rather than union organizers were adjudicated in that case. This court held in substance that the no-distribution and no-solicitation rules there involved as applied to employees constituted an unreasonable and unlawful interference with the exercise of their rights under the Act.

The case of *Thomas v. Collins*, 323 U.S. 516, adverted to in petitioner's petition in *National Labor Relations Board v. The Babcock and Wilcox Company*, 222 F. 2d 316, in which the Board is simultaneously seeking certiorari involved the constitutionality of a Texas statute. This court pointed out that its decision was confined to the narrow question of whether the application of Section 5 (of the Texas statute) in that case contravened the First Amendment. (p. 532-533) The National Labor Relations Act was not involved (p. 542), and the case is not here controlling.

The petition in *The Babcock and Wilcox Company* case refers to *Marshal Field & Co. v. National Labor Relations Board*, (C.A. 7) 200 F. 2d 375. That case involved a Board order directing the company to permit *nonemployee* organizers to carry on organizing activities in the employees' restaurants and cafeterias, and elsewhere on the company's property. The court held that the order could not be sustained unless "the *employees* are 'uniquely handicapped in matter of self-organization and concerted activity'", (p. 381) and that "substantial evidence is lacking to sustain the charging union's contention that nonemployee union organizers are unable to contact the employees." (p. 382). The court further pointed out that *Le Tourneau* and its companion *Republic Aviation* case involved employees. (p. 381) The Board's order was denied enforcement except as to Holden Court which was found to partake of "the nature of a city street" (p. 380) and was used by the public.

Conclusion

The petition for a Writ of Certiorari should be denied.

Respectfully submitted.

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September, 1955

APPENDIX A

United States Court of Appeals, Tenth Circuit

No. 4996—November Term, 1954

NATIONAL LABOR RELATIONS BOARD,
PETITIONER

v.

SEAMPRUFE, INC. (HOLDENVILLE PLANT),
RESPONDENT

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

May 4, 1955

Before BRATTON, HUXMAN and MURRAH, *Circuit Judges.*

MURRAH, *Circuit Judge.*

This is a petition to enforce an order of the National Labor Relations Board directing Seamprufe, Inc. to cease and desist from prohibiting the use of its private parking lot and adjacent area by non-employee union organizers for distribution of union literature and solicitation of Seamprufe's employees to union membership during the employees' nonworking hours, on the ground that such prohibition constituted an unfair labor practice under Section 8 (a) (1) of the National Labor Relations Act, as amended. 61 Stat. 136, 29 U. S. C. A. § 151 et seq., 158 (a) (1).

Seamprufe operates a manufacturing plant located on the outskirts of Holdenville, Oklahoma, a town of

approximately 6000 residents. It employs approximately 200 persons on a one-shift basis. Two-thirds of the employees live in Holdenville, and one-third within a radius of from five to thirty miles from the city. None of the employees are represented by a union for collective bargaining purposes.

Late in 1952, representatives of the International Ladies' Garment Workers' Union, AFL, began contacting Seamprufe's employees before and after working hours, on the private parking area provided by Seamprufe for the use of its employees and upon the private sidewalk leading to the rear entrance of the plant. There they greeted the employees and sometimes distributed union literature. After the inception of these visits, Seamprufe posted "No Trespassing" and "Private Road" signs on its premises, and consistently warned the union representatives that they were trespassing on company property and that they must leave the premises. After the Holdenville City Council enacted an ordinance forbidding anyone from going upon private property without the owner's consent under penalty of fine, the union organizers were removed by the city police and arrested for trespassing.

The employees ride to and from work in privately owned automobiles, either singly or in groups. They approach the plant from the east along the public road on the south side of the plant premises. They enter company property driving north on a one-way company-owned road, and park their cars on the company parking facilities at the rear of the plant. After parking their cars the employees walk to the

rear entrance of the plant on the private sidewalk connecting with the private road.

On leaving the plant after work, the employees proceed by direction from the parking area driving northeasterly on the private road to the public road intersection along the east side of the plant, turn south onto that road and continue thereon to the intersection with the public road bounding the plant premises on the south, where they turn left toward Holdenville. There are no stop signs at either intersection, and the Board affirmed the trial examiner's findings that the employees normally do not stop at any point in the vicinity of the plant except in the parking area because the plant is located in a semi-rural area and the traffic is light. There was testimony to the effect that at the close of work on a typical day in January 1954, 80 cars containing 225 employees left the parking lot at about a car length apart and at speeds varying from five to twenty-five miles per hour; that approximately ten minutes after cars first began to leave the lot, the entire caravan had departed from the plant area.

Following the rationale of *N. L. R. B. v. Le Tourneau Co.*, 324 U. S. 793, and succeeding cases, *N. L. R. B. v. Caldwell Furniture Co.*, 199 F 2d 267 (4th Cir.) cert. denied, 345 U. S. 907; *N. L. R. B. v. American Furnace Co.*, 158 F. 2d 376 (7th Cir.); *N. L. R. B. v. Illinois Tool Works*, 153 F. 2d 811 (7th Cir.), the Board found that the enforcement of Seamprufe's no-trespass rule was unnecessary to the maintenance of plant production and discipline; and further that the non-stop method of driving to and from

the plant area made it virtually impossible for union representatives to communicate with employees off Seamprufe's property. It therefore concluded that the enforcement of the non-discriminatory rule deprived the employees of their guaranteed right to self-organization constituting an unfair labor practice under Section 8 (a) (1) of the National Labor Relations Act.

The *Le Tourneau* case and those which followed it were concerned with the balancing of the guaranteed right of the employees to self-organization against the correlative right of the employer to maintain plant production and discipline. In arriving at this balance, the court in the *Le Tourneau* case very properly concluded that the right of the employees to distribute union literature and solicit employees upon company property was paramount to a no-solicitation rule in the absence of a showing that the enforcement of the rule was essential to the maintenance of plant production and discipline, And no such showing having been made, the court concluded that the enforcement of the company rule constituted an unfair labor practice.

The rationale of the Le Tourneau case was extended to the solicitation of employees by non-employees in a "working area used occasionally by employees and customers" in *Marshall Field & Co. v. N. L. R. B.* (7 Cir.) 200 F. 2d 375. But the latter court refused to extend the doctrine to non-employee organizers or solicitors in employees' restaurants and cafeterias in the absence of a showing that by virtue of the isolated character of their employment and residence, the

employees were uniquely handicapped in the matter of self-organization and concerted activity. See *N. L. R. B. v. Lake Superior Lumber Corp.*, 167 F. 2d 147.

Calling our attention to the fact that no right of an employee to solicit other employees on company property is involved here, but only the right of a non-employee to go upon company property in violation of a non-discriminatory no-trespass rule, Seamprufe earnestly contends that the rationale of the *Le Tourneau* case is wholly inapplicable to our facts; that our case rather falls within that part of the *Marshall Field* case which denied non-employees access to company property in the absence of a showing of restricted accessibility amounting to a handicap.

As we have seen, the fundamental basis for permitting the solicitation of union membership on company property is to vouchsafe the guaranteed right of self-organization, *N. L. R. B. v. Le Tourneau, supra.* When conducted by employees the solicitation amounts to the exercise of a right subject only to the correlative right of the employer to maintain plant production and discipline. An employee on company property exercising the right of self-organization does not violate a company no-trespass rule. *N. L. R. B. v. Monarch Tool Co.* (6 Cir.) 210 F. 2d 183. But a non-employee labor organizer who comes upon company property in violation of a non-discriminatory no-tresspass rule can justify his presence there only insofar as it bears a cogent relationship to the exercise of the employees' guaranteed right of self-organization.

Here the union which the non-employee solicitors represented was not the bargaining agent for the employees. Cf. *N. L. R. B. v. Monarch Tool Co.*, *supra*. Indeed the employees did not belong to any union, and the solicitors were therefore strangers to the right of self-organization, absent a showing of non-accessibility amounting to a handicap to self-organization.

The Board found special circumstances of inaccessibility. But we do not think that conclusion is legally justified by the facts. True, the union organizers could not contact the employees at the entrance or exit to the company property, but these circumstances did not insulate the employees from the union organizers. Unlike the employees of a lumber or mining camp who live and work on company property isolated from outside contacts, as in *N. L. R. B. v. Lake Superior Lumber Corp.*, supra, the employees here lived in or near a small city and were easily accessible to union solicitors. There was no impediment to union solicitation off company property amounting to a deprivation of the right of self-organization.

The no-trespass rule was non-discriminatory. There is no showing of antiunion discrimination as in *N. L. R. B. v. Stowe Spinning Co.*, 336 U. S. 226 and *Bonwit Teller, Inc.* v. *N. L. R. B.* (2 Cir.) 197 F. 2d 640, and its enforcement did not constitute an unfair labor practice.

The enforcement of the Board's order is therefore denied.

Judgment

One Hundred Seventh Day, November Term, Wednesday, May 4, 1955.

Before Honorable SAM G. BRATTON, Honorable WALTER A. HUXMAN, and Honorable ALFRED P. MURRAH, Circuit Judges.

This cause came on to be heard on the transcript of the record from the National Labor Relations Board and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the petition for enforcement of the Board's order be and the same is hereby denied.

APPENDIX B

The relevant provision of the National Labor Relations Act, as amended (61 Stat. 136, 29 U.S.C. 151, *et seq.)*, are as follows:

Rights of Employees

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Unfair Labor Practices

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *